In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 746

JOSEPH P. GLIMCO, PETITIONER

v.

THE HONORABLE JAMES B. PARSONS, UNITED STATES DISTRICT COURT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 50a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1967. The petition for a writ of certiorari was filed on October 20, 1967. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's application for a writ of prohibition to compel dismissal of an indictment was properly denied.

STATUTE INVOLVED

Sections 186(a) and (b)(1) of Title 29 U.S.C. provide:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence

any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

STATEMENT

Petitioner was originally indicted in the Northern District of Illinois on December 17, 1964. The indictment, which also named other defendants, contained seventeen counts, eleven of which charged petitioner with conspiracy (count 1) and with violations of 29 U.S.C. 186(b) in that on various occasions he, being a representative of employees, accepted gifts from Frank Pesce and Don Ross, two employers.

Petitioner filed a motion to dismiss the original indictment (Pet. 29a-34a), alleging, among other grounds, that as to the four counts charging receipt of articles from Frank Pesce, counts 4, 5, 14 and 16 (Pet. App. 19a-26a), the indictment was "fatally defective" because there was "absolutely no pleading by the plaintiff herein that Pesce or Best Sanitation

[Pesce's company] was an industry affecting commerce or that its employees were employed in an industry affecting commerce" (Pet. 30a). Paragraph 6 of count 1, which was incorporated by reference into each of the relevant counts, set forth merely that (Pet. 28a):

> At all times pertinent hereto, Best Sanitation and Supply Co. (hereinafter referred to as "Best") maintained an office in Chicago, Illinois, and Frank Pesce was the owner of said Best.

On August 25, 1965, District Judge Igoe granted petitioner's motion to dismiss the indictment without stating his reasons.

On June 1, 1966, a grand jury returned the present indictment, naming petitioner as a defendant in four of the counts—numbers 4, 5, 6 and 8. These counts (set forth at Pet. 19a-26a) are in all relevant respects identical to counts 4, 5, 14 and 16 of the indictment dismissed by Judge Igoe, with one exception. The difference is that paragraph 6 of count 1 of the new indictment, which is incorporated by reference into each of counts 4, 5, 6 and 8, adds the words "and said Best was engaged in an industry affecting commerce".

On November 17, 1966, petitioner filed a motion (Pet. 8a) before District Judge Parsons to dismiss counts 4, 5, 6 and 8 of the instant indictment on the ground that they were identical to counts 4, 5, 14 and 16 of the indictment previously dismissed by Judge Igoe. He argued that Judge Parsons had no authority to redetermine a question of law previously deter-

mined by another district judge (Pet. 9a-18a). The motion was denied without opinion on April 4, 1967.

On September 8, 1967, petitioner filed a writ of prohibition (Pet. 1a-7a) in the United States Court of Appeals for the Seventh Circuit seeking an order directing Judge Parsons to proceed no further in the instant case and to honor the prior ruling of Judge Igoe. The court of appeals denied the petition for a writ of prohibition (Pet. 50a-51a).

ARGUMENT

The denial of the petition for a writ of prohibition was proper. Contrary to petitioner's assertion, the second indictment was not identical to the first. It differed in its allegation as to an important jurisdictional fact—that Best was engaged in an industry affecting interstate commerce. It was the lack of such an allegation which petitioner had argued was fatal when he moved to dismiss the original indictment. In these circumstances the government was obviously not estopped from filing a new indictment incorporating the additional allegation, nor was Judge Parsons barred from upholding it. See *United States* v. *Mathies*, 350 F.2d 963 (C.A. 3).

There was, in any event, no reason for a writ of prohibition. Even if it were to be assumed that Judge Parsons erred in refusing to dismiss the second indictment it is an error which could be adequately corrected on appeal. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379; *Parr* v. *United States*,

351 U.S. 513. No special cause is present in this case to justify the circumvention of the normal appellate process by the grant of the extraordinary writ of prohibition. See *Roche* v. *Evaporated Milk Association*, *supra*, at 27-30.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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